(9)

No. 92-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under section 207(o) of the Fair Labor Standards Act, a public employer is required to reach an agreement with a labor organization to provide compensatory time when state law prohibits collective bargaining.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a direct and compelling interest in this case as the Court's decision will have a substantial impact on the ability of state and

local governments to provide essential services to their citizens.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court held that Congress could constitutionally extend the wage and hour provisions of the Fair Labor Standards Act ("FLSA") to state and local government employers. In response to *Garcia*, Congress enacted section 207(o) of the FLSA, 29 U.S.C. § 207(o). Section 207(o) authorizes public employers to compensate employees for overtime work with compensatory time off in lieu of cash pursuant to an agreement either with the employees' representatives or with individual employees. Petitioners contend that a public employer may only provide compensatory time to employees who have designated a "representative" pursuant to an agreement with that representative, even in States that do not allow public sector collective bargaining. Because this issue is of utmost importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is section 207(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(o). Added to the FLSA in 1985 to alleviate the financial impact on public employers of this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985),[2] section 207(o) authorizes public employers,

[1] In accordance with Rule 37 of the Rules of this Court, the parties' letters of consent have been filed with the Clerk of the Court.

[2] Both the House and Senate committees responsible for section 207(o) "recognize[d] that the financial costs of coming into compliance with the FLSA—particularly the overtime provisions of section 7—[were] a matter of grave concern to many states and localities." S. Rep. 99-159, 99th Cong., 1st Sess. 8 (1985); H.R. Rep. 99-331, 99th Cong., 1st Sess. 18 (1985); *see also* S. Rep. 99-159 at 16; H.R. Rep. 99-331 at 9 (quoting Congressional Budget Office estimate that *Garcia* "would result in initial annual compliance costs totalling between $0.5 billion and $1.5 billion nationwide").

pursuant to agreements with their employees, to provide "compensatory time"—paid time off—in lieu of cash for overtime work. The compensatory time agreements must be between the public employer and either the individual employees or their representatives.

Before the enactment of section 207(o), the FLSA flatly prohibited employers from providing compensatory time for overtime work. 29 U.S.C. § 207(a) (employers must pay employees one and one-half times normal rate for overtime). In addition to the fiscal concerns raised by many state and local government officials, Congress also recognized that "[m]any municipal employees both enjoy 'comp-time' and need it to enable them to better perform their jobs." H.R. Rep. 99-331 at 17.[3] Section 207(o) was thus intended both to provide relief to public employers and to protect public employees.

Respondent Harris County, Texas, has an individual employment agreement with each of its deputy sheriffs pursuant to which the deputies receive one and one-half hours of compensatory time off for each hour of overtime work. Petitioners, 113 deputy sheriffs employed by Harris County, seek back overtime pay as of the date they designated the Harris County Deputy Sheriffs' Union as their "representative" for the purpose of negotiating a new agreement governing compensatory time.

[3] At the same time that it authorized employers to award compensatory time, however, Congress did not intend to "retreat[] from the principles" that motivated it originally to extend the FLSA to public employers. S. Rep. 99-159 at 7; H.R. Rep. 99-331 at 17. Accordingly, compensatory time must be awarded "at a rate not less than one and one-half hours" for each hour of overtime, § 207(o)(1); employers must pay employees for additional overtime in cash once they accrue compensatory time in excess of a statutory limit, § 207(o)(3)(A); and employees must be compensated in cash for unused compensatory time upon termination, § 207(o)(4).

Simply designating a "representative," petitioners contend, both nullified their existing compensatory time agreements with Harris County, and obliged the County to pay cash (at time and a half) for overtime work until such time as the County and the "representative" worked out some other compensatory time agreement, if ever, despite the fact that Texas law prohibits Harris County from engaging in collective bargaining.

Thus, under petitioners' interpretation of section 207(o), Congress intended to put public employers in Texas, and other States that prohibit public sector collective bargaining, to the following choice: either violate (or repeal) the state law prohibition on collective bargaining with public employees, or pay the employees time and a half in cash for each hour of overtime worked. But Congress had a simpler and more modest purpose in mind when it enacted section 207(o): to extend certain minimum standards relating to overtime compensation to public employees, while preserving to the greatest extent possible compensatory time arrangements that have arisen under varying state laws governing labor relations in public employment. In other words, Congress intended to authorize public employers to continue their pre-*Garcia* practice of providing compensatory time (subject to certain minimum standards), whether pursuant to some form of collective bargaining agreement, in those States that permit collective bargaining by public agencies, or pursuant to individual employment contracts, in those States, like Texas, that do not.

Congress carefully crafted plain and unambiguous language in section 207(o) to effectuate its purpose. Compensatory time may be provided pursuant to either an agreement "between the public agency and representatives of [its] employees" or "an agreement or understanding arrived at between the employer and employee before the performance of the work." In this case, there is no agreement between Harris County and a representative of petitioners because Texas law prohibits such agreements.[4] But Harris County and its deputy sheriffs have entered into agreements "between the employer and the employee before the performance of the work," and those employment contracts provide for the payment of compensatory time. Accordingly, Harris County's use of compensatory time is plainly authorized by the language of section 207(o).

Overcoming section 207(o)'s plain language elicits no small amount of ingenuity on petitioners' part. Citing section 207(o)'s "open texture," petitioners assert that the language of the provision is ambiguous. Petitioners thereupon invoke the regulations promulgated under section 207(o) by the Department of Labor. These regulations provide that a representative designated by the employees "need not be a formal or recognized bargaining agent," and that "[w]here employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency . . . ." 29 C.F.R. § 553.23(b)(1). According to petitioners, the regulations make clear that the *designation* of a representative by a public employee obligates the public employer either to negotiate a new compensatory time agreement with the representative, even if doing so is unlawful under state law, or to pay cash for overtime work.

Petitioners' analysis fails at both steps. First, petitioners' asserted "ambiguity" does not exist. Second, even if their argument could survive a reading of the statute's dispositive language, the regulations on which they rely yield an equally fatal result. The critical issue under

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[4] *See* Tex. Rev. Civ. Stat. Ann. art. 5154c(1) and (2) (Vernon 1987). The voters of Harris County have not adopted The Fire and Police Employee Relations Act, *see* Tex. Rev. Civ. Stat. Ann. art. 5154c-1 (Vernon 1987), which would permit Harris County to enter into collective bargaining agreements with its firefighting and law enforcement employees. Pet. App. 4a.

the regulations is not whether the employees have a "recognized," "formal," or merely "designated" representative—it is whether they have a "representative" at all. And this question, as the Labor Department has made clear, is to be determined by state law. In this case it is undisputed that Texas law precludes petitioners from designating a representative with authority to negotiate and enter a compensatory time agreement.[4] Thus, the regulations, correctly understood, are in harmony with the language of section 207(o) and with Congress' purpose in enacting it.

Beyond these points, petitioners' interpretation of section 207(o) would render the provision authorizing compensatory time agreements between the public employer and individual employees virtually meaningless. Moreover, empowering each public employee to designate his own representative without regard to state law would force public employers to negotiate as many separate compensatory time agreements as there are representatives designated by individual employees (or groups thereof). Finally, even if section 207(o) were ambiguous and petitioners' proposed construction of it otherwise plausible, that construction violates the principle that federal courts will not interpret a statute to intrude upon an area of traditional state governance, such as state and local employment relations, absent a plain statement in the statute that Congress intended such a result. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 207(o) UNAMBIGUOUSLY AUTHORIZES RESPONDENTS TO PROVIDE COMPENSATORY TIME PURSUANT TO AGREEMENTS WITH INDIVIDUAL EMPLOYEES.

Statutory construction begins, of course, with a "strong presumption that Congress expresses itself through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Sullivan v. Everhart*, 494 U.S. 83 (1990). The language and structure of section 207(o), set out in the margin, unambiguously authorize respondents to provide compensatory time pursuant to agreements with individual deputies.[5]

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[5] In relevant part, Section 207(o) provides:

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between

Under section 207(o)(2)(A), a public employer may provide compensatory time in lieu of cash as long as it is provided according to either of two kinds of agreements. Subclause (i) provides that a public employer may provide compensatory time pursuant to applicable provisions of an "agreement between the public agency and representatives of [its] employees," and the agreement may be "a collective bargaining agreement, memorandum of understanding, or any other agreement." 29 U.S.C. § 207(o)(2)(A)(i). Following the disjunctive "or," subclause (ii) provides that "in the case of employees not covered by subclause (i)," an employer may award compensatory time pursuant to applicable provisions of an agreement or understanding between "the employer and employee before the performance of the work." 29 U.S.C. § 207(o)(2)(A)(ii). With respect to employees hired before April 15, 1986, the regular compensatory time practice in effect as of that date constitutes an agreement under subclause (ii). 29 U.S.C. § 207(o)(2)(B).

The application of the statutory language to this case is straightforward. Harris County has no compensatory

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the employer and employees before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed in paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection . . . .

29 U.S.C. § 207(o)(1)-(2). The FLSA elsewhere provides that "[a]ny employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages." *Id.* § 216(b).

time agreement with a representative of its deputies, so the deputies are "not covered by subclause (i)." But as the court below held, the County's compensatory time policy in effect as of April 15, 1986, constitutes an agreement between the County and the deputies hired prior to that date, and each deputy hired after that date signed an individual compensation form agreeing to that policy. Pet. App. 6a. Accordingly, the County may, under subclause (ii), provide compensatory time pursuant to those agreements.[6]

Petitioners, however, claim to be confused by the language of section 207(o)(2), arguing that "exactly which classes of employees are 'covered by subclause (i)' and which are 'not covered' is not explicitly stated in the statutory text." Brief for Petitioners ("Pet. Br.") at 10. In support of this bald assertion of ambiguity petitioners offer no more than an equally bald assertion of ambiguity from the Tenth Circuit:

> We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative.

Id. at 20-21 (quoting *Local 2203 v. West Adams Cty. Fire Dist.*, 877 F.2d 814, 816-17 (10th Cir. 1989)). Neither petitioners nor the Tenth Circuit identify the specific "wording of subclause (i)" that gives rise to their alleged confusion. Nor do they explain how that wording can reasonably be read to apply only to "employees who

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[6] *See also Dillard v. Harris*, 885 F.2d 1549, 1552-53 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 210 (1990) (following precisely this plain language analysis); *Wilson v. City of Charlotte*, 964 F.2d 1391, 1394-95 (4th Cir. 1992) (*en banc*) (same); *id.* at 1396 (Luttig, J., concurring in part and concurring in the judgment in part) (same).

do not have a representative." They do not explain it because they cannot. The words of the statute simply do not yield the alternative reading that petitioners and the Tenth Circuit claim to see. In this regard, we cannot improve on the concise exegesis supplied by Judge Luttig in *Wilson*:

> The statute . . . is not at all ambiguous. The reference in subsection (2)(A)(ii) to "employees not covered by subclause (i)" can only be to employees who are not subjects of an agreement between their agency and their representative. *It cannot grammatically (and does not logically) refer to employees who are unrepresented because the compound objects of the prepositional phrase "pursuant to" in subsection (i) are the forms of agreements enumerated therein.* The subsection does not denominate a class of represented employees; it identifies certain agreements (in addition to those in subsection (ii)) that will satisfy the requirement of subsection (2)(A) that compensatory time be provided pursuant to an agreement.

964 F.2d at 1397 (Luttig, J., concurring in part and concurring in the judgment in part) (citations omitted) (emphasis added).[7] Thus, the plain language of the statute unambiguously authorizes Harris County to provide compensatory time pursuant to agreements with individual deputies.

[7] *See also Dillard*, 885 F.2d at 1552-53 ("It appears clear that the prerequisite for employees being 'covered under subclause (i)' is an agreement or understanding between the employer and the employees' representative. Since the employees here had no agreement or understanding under subclause (i), they were not 'covered' by it and thus were governed by subclause (ii).").

II. THE LEGISLATIVE AND REGULATORY HISTORY OF SECTION 207(o) SUPPORTS THE CONCLUSION THAT RESPONDENTS MAY PROVIDE COMPENSATORY TIME PURSUANT TO AGREEMENTS WITH INDIVIDUAL EMPLOYEES.

In the next step of their argument, petitioners rely upon the asserted ambiguity in the statute as a springboard to the Department of Labor's compensatory time regulations and to the rule of judicial deference to agency interpretations articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The regulation, however, is no more helpful to petitioners' cause than the statutory language itself.

In relevant part, the regulation provides:

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b)(1). According to petitioners, this regulation makes clear "beyond a doubt" that at the moment they designated a compensatory time representative, Harris County was "required either to pay [them] overtime pay under the FLSA's normal rules or to reach and abide by a compensatory time agreement with that representative." Pet. Br. at 11-12. Petitioners' position fails because it ignores the critical role that state public sector bargaining laws and practices play in the proper implementation of section 207(o).[8]

[8] *See* Pet. Br. at 32 ("Plaintiffs' position on the construction of the statute is simple: § 7(o)(2)(A)(i) governs all cases where an employee has designated a representative. *It does not matter*

Indeed, a careful analysis of the statute's legislative and regulatory history demonstrates that in extending certain minimum overtime compensation protections to public employees, Congress did not intend to otherwise disturb existing compensatory time agreements and the various state laws and practices governing public employment that gave rise to those agreements. This congressional concern for preserving state public employment relations law explains the distinction between subclauses (i) and (ii): in States that either permit or require public employers to bargain collectively with their employees, compensatory time may only be provided pursuant to an agreement with the employees' representative, while in States (like Texas) that prohibit public sector bargaining, the employer may provide compensatory time pursuant to agreements with individual employees.

The National Labor Relations Act ("NLRA"), which governs collective bargaining in the private sector, does not apply to public employers. *See* NLRA § 2(2), 29 U.S.C. § 152(2) (1988). Accordingly, States have developed by statute, by judicial decision, or through practice, a wide variety of policies relating to public sector labor relations.[9] Though diverse, these state arrangements gen-

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whether the representative would be prohibited, under state law, from engaging in full collective bargaining, from entering binding contracts, or from otherwise engaging in representation activities beyond the most informal arrangements.") (emphasis added); *see also id.* at 24, 28-29.

[9] This discussion draws mainly upon three sources. The most comprehensive discussion of state laws and practices in effect at the time section 207(o) was enacted is R. Kearney, *Labor Relations in the Public Sector*, 53-74 (1984). An excellent summary is provided in Todd D. Steenson, Note, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity*, 75 Minn. L. Rev. 1807, 1817-20 (1991) [hereinafter Note, 75 Minn. L. Rev.]. *See also Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1676-82 (1984).

erally fall into one of three categories: (1) formal collective bargaining procedures modeled on the NLRA; (2) bargaining and contracting practices which, while not formal collective bargaining, are nonetheless binding on the public employer; and (3) outright prohibitions on public sector collective bargaining.[10]

Both the House and the Senate Committee Reports accompanying section 207(o) clearly acknowledge these varying public employment bargaining arrangements and express the Committees' intention not to disturb them. The House Report put it as follows:

> The Committee is also aware that many state and local government employers and their employees have agreed to voluntary arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of formal collective bargaining—[are] mutually satisfactory solutions that are both fiscally and socially responsible. *To the extent practicable, the bill accommodates such preexisting arrangements.* In addition, the bill offers employees and their employers the opportunity to voluntarily agree to the acceptance of compensatory time off at a premium rate in lieu of pay for overtime.

H.R. Rep. 99-331, 99th Cong., 1st Sess. 18 (1985) (emphasis added).[11] Congress thus recognized, approved, and intended to accommodate the various public sector compensatory time arrangements that existed when section 207(o) was enacted, and to authorize their continued use

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[10] Included in this category, for present purposes, are so-called "meet and confer" states, which permit or require public employers to meet and confer with employee representatives but prohibit the employers from entering into collective agreements. *See* Note, 75 Minn. L. Rev. at 1819-20.

[11] The Senate Report includes a nearly identical passage with the exception of the last sentence, which appears only in the House version. *See* S. Rep. 99-159, 99th Cong., 1st Sess. 8 (1985).

in the future, subject, of course, to the minimum standards prescribed elsewhere in the provision. *See* note 3, *supra*. The language of section 207(o)(2) was carefully drawn to accommodate all state law bargaining arrangements, whether collective or individual.

In 1984, slightly over half the States had collective bargaining systems similar to that mandated in the private sector by the NLRA. *See* R. Kearney, note 9, *supra*, at 55. In those States, public employers are required to bargain collectively with their employees over terms such as overtime compensation.[12] As a matter of state law, therefore, public employers in States with NRLA-style labor relations laws may provide compensatory time only pursuant to an agreement with the employees' representative. Subclause (i) of section 207(o)(2)(A), which permits employers to provide compensatory time pursuant to a collective bargaining agreement, plainly conveys Congress' intention not to disturb such formal, NLRA-style arrangements.

In addition to formal "collective bargaining agreements," subclause (i) also authorizes employers to provide compensatory time pursuant to a "memorandum of understanding, or any other agreement" with the employees' representative. 29 U.S.C. § 207(o)(2)(A)(i). This reference in subclause (i) to less formal agreements reflects Congress' recognition that certain States enforce labor contracts between public employers and employee representatives notwithstanding the absence of formal collective bargaining laws. *See* Note, 75 Minn. L. Rev. at 1819 & n.65. Though the employee "representatives"

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[12] *See* Note, 75 Minn. L. Rev. at 1840-41 ("In states with [NLRA-style] policies, overtime compensation will almost certainly be a mandatory subject of bargaining. Thus, under state law, the public employer would be required to bargain with the representative over compensatory time and could not unilaterally impose compensatory time policies."); *see also id.* at 1837 & n.158.

in these States are not properly characterized as "recognized" collective bargaining agents, these States nonetheless treat an agreement between public agencies and such representatives as binding. *See* note 13, *infra*.

Subclause (ii) agreements—those between the public employer and individual employees—were plainly designed by Congress to accommodate States that prohibit collective bargaining by some or all public employers. In 1984 at least ten States prohibited public sector collective bargaining altogether. *See* Note, 75 Minn. L. Rev. at 1819-20. Thus, Congress enabled public employers who were prohibited from collective bargaining to continue to provide compensatory time as they always had—pursuant to individual employment agreements with their employees. Congress manifestly did not intend, contrary to petitioners' argument, *see* note 8, *supra*, to impose on public employers a federal collective bargaining obligation at odds with state law.

As noted above, petitioners' interpretation of section 207(o)(2) is based upon the Department of Labor regulations implementing that provision. Specifically, petitioners seize on the statement in the regulation that "[w]here the employees have a representative, the agreement or understanding . . . must be between the representative and the public agency." 29 C.F.R. § 553.23(b)(1). Petitioners contend that this requirement, when coupled with the statement in the regulation that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees," *id.*,[13] makes clear that a public employee's

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[13] The regulation's statement that a "representative need not be a formal or recognized bargaining agent" is based on the House Report. *See* H.R. Rep. 99-331 at 20. This language, like the statute's reference to a "memorandum of understanding, or any other agreement," see 29 U.S.C. § 207(o)(2)(A)(i), merely seeks to accommodate the States that authorize public employers to bargain and contract with their employees' representative notwithstanding the absence of formal collective bargaining laws.

designation of a representative entitles the employee to cash overtime pay in the absence of a subclause (i) agreement between the employer and the representative.

This argument, however, ignores the fact that the Labor Department expressly intended the compensatory time regulation, like section 207(o) itself, to harmonize with state law. When the regulation was promulgated, the Department explained:

> The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of *whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.*[14]

Read in light of this directive, the regulation thus merely makes explicit what the statute and legislative history implicitly reveal—that state law governs the question of whether employers may avail themselves of subclause (ii), or are instead constrained to reach an agreement with their employees' representative under subclause (i). If employees have a representative as "determined in accordance with State or local law and practices," then the employer can only provide compensatory time pursuant

[14] Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2014-15 (1987) (emphasis added). The Department made this statement in response to comments received from various public employers expressing concern that the draft regulation (which, in relevant part, is identical to the final version) "should operate only where collective bargaining obligations are provided for by State law." *Id.* at 2014. Petitioners assert that the "Department expressly *rejected* this position." Pet. Br. at 30 (emphasis in original). But the fact that the Department did not rewrite the regulation in response to the comment does not mean that it rejected the comment; indeed, in light of the Department's assertion that state law governs the issue of whether the employees have a representative, it is clear that the Department believed that the concerns raised in the comment and the proposed regulation were in harmony.

to an agreement with that representative.[15] Here, however, petitioners are precluded by Texas law from having a representative with authority to enter a subclause (i) compensatory time agreement on their behalf. And in the absence of such an agreement, individual compensatory time agreements are authorized under subclause (ii) of the statute.

Moreover, petitioners' interpretation of the regulations would be a prescription for chaos in public sector labor relations in States like Texas. If, as petitioners contend, the statute authorizes each employee to "designate" a representative without regard to state law, it is conceivable that, in the words of one comment to the proposed regulation, "an employer could find itself dealing with a different representative for each employee." 52 Fed. Reg. at 2014. Only by interpreting "representative" consistent with state law can the practical problems presented by non-exclusive representation be avoided. *Cf.* Note, 75 Minn. L. Rev. at 1841-42.

Finally, interpreting section 207(o)(2)(A) and its implementing regulation to respect state law has the virtue of assigning a meaningful purpose to subclause (ii). If any public employee, either individually or as part of a group, and despite any state law restrictions, can "designate" an "FLSA representative," and thereby impose on the employer a duty either to negotiate with the representative or to pay cash, subclause (ii) serves no

[15] Petitioners attempt to avoid the Labor Department's state law comment by suggesting that "state law may be relevant in determining when employees 'have designated a representative.'" Pet. Br. at 31. The Department's statement, however, says that state law determines "whether employees *have a representative*," 52 Fed. Reg. at 2015 (emphasis added), not whether they have designated one. Petitioners' effort to equate the employees' designation of a representative with the existence of a representative ignores the fact that some public employees, as a matter of state law, cannot have a "representative," whether they have "designated" one or not.

purpose. Divorced from the rationalizing effect of state law, petitioners' interpretation of section 207(o)(2)(A) would effectively reduce the scope of subclause (ii) to a class of employees who choose not to designate a representative, which, as we shall demonstrate, was hardly the function intended by its framers.

To justify assigning to subclause (ii) such a hollow function, petitioners claim that subclause (ii) agreements would otherwise permit a public employer "unilaterally" to "impose" upon employees compensatory time arrangements of the employer's own choosing. *See* Pet. Br. at 6, 20-21. Indeed, in discussing the implementing regulation, petitioners argue: "An employer cannot, as respondents have done, impose its chosen compensatory time policy on those of its employees who have designated a representative by treating its policy as individual agreements that have been made conditions of employment for those employees." Pet. Br. at 12. According to petitioners, therefore, any employee can prevent an employer from imposing a compensatory time agreement by simply designating a representative.

Amici's response is twofold. First, the employer cannot dictate any compensatory time agreement of its choosing. As the statute makes clear, all compensatory time agreements, whether under subclause (i) or (ii), must at a minimum conform to the requirements set forth in the statute, including especially the requirement that compensatory time be provided "at a rate of not less than one and one-half hours for each hour" of overtime.[16] *See* 29 U.S.C. § 207(o)(1).

[16] Petitioners assert that only "a negotiated [compensatory time] agreement with the employee's designated representative" provides "a practical guarantee that the terms of the compensatory time arrangement take into account the interests of both the employer and the employees. Absent such agreement there is of course no such assurance." Pet. Br. at 17. This statement ignores the fact that the statute itself prescribes minimum standards that must be included in any compensatory time agreement. *See* note 3, *supra*.

Second, and more importantly, Congress clearly intended subclause (ii) to authorize employers to condition employment on acceptance of specific compensatory time policies. Both the House and Senate Reports, in nearly identical passages, confirm this reading of subclause (ii). The Senate version reads:

> The agreement or understanding to provide time off as compensation for overtime *may take the form of an express condition of employment*, so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of this new subsection.

S. Rep. 99-159 at 11; *see also* H.R. Rep. 99-331 at 20.[17] It could not be clearer that compensatory time agreements with individual employees may take the form of express conditions of employment.

Having now fully explored the workings of the statute and its implementing regulations, it is clear that they yield the same result. As we have demonstrated above, employers whose employees have a representative, as that term is defined by state law or practice, may provide compensatory time only pursuant to a subclause (i) agreement with that representative. Because subclause (i) is limited by its terms to employees who are covered by an agreement with their representative, it follows that subclause (ii), which applies "in the case of employees not

[17] This authority to include compensatory time as a condition of employment is codified at 29 C.F.R. § 553.23(c)(1). In commenting on the proposed regulation, the National Education Association "argued that the statute gives the employees the right to increase their bargaining power by designating representatives to enter into agreements with employers on the issue of compensatory time," and urged that all references to compensatory time agreements as conditions of employment should be deleted from the regulations. 52 Fed. Reg. at 2015. Relying upon the Committee Reports, the Secretary *rejected* the comment. *Id.*

covered by subclause (i)," authorizes employers to provide compensatory time to all non-represented employees pursuant to the terms of individual employment contracts. Since under Texas state law petitioners cannot and do not have a "representative," the County may avail itself of subclause (ii).

III. PETITIONERS' PROPOSED CONSTRUCTION OF SECTION 207(o) IS PRECLUDED BY THIS COURT'S HOLDING IN *GREGORY v. ASHCROFT*.

Petitioners' proposed construction of section 207(o) fails for another reason. Even if the statute is ambiguous, and even if the Labor Department's implementing regulation truly did authorize public employees to designate compensatory time bargaining representatives notwithstanding contrary state law, petitioners' construction of section 207(o) would nonetheless be precluded by this Court's decision in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

In *Gregory*, this Court held that federal courts will interpret a statute to "upset the usual constitutional balance of federal and state powers" only if Congress "make[s] its intention to do so unmistakably clear in the language of the statute." *Id.* at 2401 (internal quotation omitted).[18] At issue in that case was whether a Missouri state constitutional provision mandating that all judges retire at age 70 violated the Age Discrimination in Employment Act of 1967 ("ADEA"). Concluding that a State's power to set the qualifications of its public officials "is an authority that lies at the heart of representative government . . . [and is] reserved to the States under the Tenth Amendment," *id.* at 2402 (citations and internal quotations omitted), the Court analyzed whether Congress nonetheless intended the ADEA to override this State

[18] *See also United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . . .").

prerogative pursuant to its power under either the Commerce Clause or section 5 of the Fourteenth Amendment. *Id.* at 2404-06. Finding congressional intent to be "ambiguous," the Court concluded: "In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.* at 2406.

Under petitioners' proposed construction of section 207(o), Harris County must either enter into compensatory time agreements that state law forbids or pay petitioners cash rather than compensatory time for overtime work. Petitioners' proposed interpretation of the statute would thus clearly have the effect of "upset[ting] the usual balance of federal and state powers" in an area of traditional state governance. *Gregory*, 111 S. Ct. at 2401.[19] Accordingly, that interpretation must be rejected unless supported by a "plain statement" that Congress intended to displace state laws prohibiting public sector collective bargaining agreements concerning compensatory time. *Id.* Because section 207(o) contains no indication—much less an "unmistakably clear" one—that Congress

[19] The power of state and local governments to establish the wage and hour policies for their employees is an "undoubted attribute of state sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), *overruled on other grounds by Garcia*, 469 U.S. at 546-47. The *Usery* Court even addressed the specific issue of overtime compensation: "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and *what compensation will be provided where these employees may be called upon to work overtime.*" *Usery*, 426 U.S. at 845 (emphasis added). As *Gregory* clearly indicates, the notion that certain governmental functions are inherent attributes of state sovereignty survived the Court's decision in *Garcia*, which held only that there are no judicially enforceable constraints on Congress' power under the Commerce Clause to interfere with state regulation of such traditional state governmental functions. *Garcia*, 469 U.S. at 546-47.

intended the upheaval of state public sector labor laws that petitioners advocate, petitioners' proposed construction of section 207(o) must be rejected.[20] *Id.*

The foregoing analysis is not altered by *Chevron*'s rule of judicial deference to agency interpretations of ambiguous statutes. Assuming again that the Labor Department's compensatory time regulation would yield the result petitioners advocate, *Gregory* rather than *Chevron* provides the rule of decision in this case. The *Gregory* plain

[20] The Court in *Gregory* also noted that "[a]pplication of the plain statement rule thus may avoid a potential constitutional problem." 111 S. Ct. at 2403. The rationale for this rule is similar to the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress." *Edward J. De Bartolo Corp. v. Florida Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). In light of *Garcia's* holding that there are no judicially enforceable restraints on Congress' power under the Commerce Clause to regulate state and local public sector employment relations, petitioners' proposed construction of section 207(o) would not appear to raise any "serious constitutional problems." *Id.* In light of *Gregory*, however, and the Court's decision last Term in *New York v. United States*, 112 S. Ct. 2408, 2423 (1992) (invalidating a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that the Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce"), it is not clear whether *Garcia* still provides the appropriate standard for analyzing Tenth Amendment challenges to Congress' authority to interfere with state governmental functions. *See, e.g., The Supreme Court: 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 173 (1992) ("Last Term, in *New York v. United States*, the Court, *although not expressly overruling Garcia*, again struck down part of a congressional act for infringing upon state sovereignty.") (emphasis added). These post-*Garcia* cases thus make it appropriate to apply both the *Gregory* plain statement rule, and the *De Bartolo* rule to this case, and under both rules, petitioners' proposed construction of section 207(o) must be rejected. *See New York*, 112 S. Ct. at 2425 (rejecting interpretation of statute based upon both *Gregory* and *De Bartolo*).

statement rule is designed to "assure[] that the legislature has in fact faced, and intended to bring into issue," the weighty concerns of federalism that must be overcome to warrant federal intrusion into the sovereign realm of the States. 111 S. Ct. at 2401, quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation omitted). Indeed, the plain statement rule is especially important in light of *Garcia*, which left to Congress the responsibility for "ensur[ing] that laws that unduly burden the States [are not] promulgated." *Garcia*, 469 U.S. at 556. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 111 S. Ct. at 2403, quoting L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988).

Accordingly, unless it is "absolutely certain," *Gregory*, 111 S. Ct. at 2403, that Congress intended to "upset the usual balance of federal and state powers," *id.* at 2401, a court will not interpret a statute to do so. Yet to defer under *Chevron* to a regulation that would have that effect would be tantamount to empowering an administrative agency to do precisely what this Court, under *Gregory*, will not. In short, when *Gregory* and *Chevron* collide, the federalism values that *Gregory* protects must control.[21]

In addition, as the foregoing discussion makes clear, we believe that Congress' respect for the States' public sector bargaining arrangements is a singular virtue of the compensatory time policy established in section 207(o). That the States have developed a variety of approaches in this area of public sector labor relations is an inevitable, and healthy, concomitant of our federalist "system of dual

[21] *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1788-89 (1991) (O'Connor, J., dissenting) (would invalidate regulations that raise constitutional problems rather than defer to those regulations and be forced to decide the constitutional issue).

sovereignty between the States and Federal Government"; preserving that diversity is itself a weighty basis for favoring the statutory construction that we have advanced. *Gregory*, 111 S. Ct. at 2399; *cf. De Bartolo*, 485 U.S. at 575.

In the most recent federal appellate decision construing section 207(o), however, five judges, dissenting from a majority opinion adopting the statutory constructions that *amici* urge here, decried the "inequitable result" of resting public employees' compensatory time rights "on the *idiosyncrasies of state legislatures.*" *Wilson v. City of Charlotte*, 964 F.2d 1391, 1400 (4th Cir. 1992) (*en banc*) (Ervin, C.J., dissenting) (emphasis added). The dissenters in *Wilson* were incredulous "that Congress intended for employees' rights under the Act to hinge upon the *mere fortuity of geography.*" *Id.* at 1403 (emphasis added). The very essence of federalism, however, is the freedom of the people of the several States—separated only by the "fortuity of geography"—to develop varying solutions to common concerns.

Tocqueville recognized that the federalist system established by the Constitution was a unique innovation of the American founding. *See* 1 A. de Tocqueville, *Democracy in America* 181 (H. Reeve. trans. 1961). Premised on the idea that the government established by the Constitution would be one of delegated and therefore limited powers, "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to insure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia*, 469 U.S. at 572 (Powell, J., dissenting). The Framers' vision of the "balance of power between the States and the Federal Government" was captured in Madison's classic formulation in Federalist No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). The States' "residuary" sovereign powers were to be "inviolable," and the Supreme Court was assigned the crucial role of policing the boundary between the dual State and Federal sovereigns:

> It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, and according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments . . . is a position not likely to be combated.

The Federalist No. 39, at 245-46.

The Court thus fulfilled its proper constitutional role last Term in *New York v. United States*, 112 S. Ct. 2408 (1992), when it invalidated a provision of the Low-Level Radioactive Waste Policy Amendments of 1985. After describing in detail the sources and extent of congressional authority to regulate the States, *id.* at 2417-24, the Court characterized the so-called "take title" provision of the statute as "offer[ing] state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." *Id.* at 2428. The Court held that because either course of action alone

"would be beyond the authority of Congress, . . . it follows that Congress lacks the power to offer the States a choice between the two." *Id.* The Court concluded that "[w]hether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 2429.[22]

Consistent though the Court's decision in *New York v. United States* was with the Founders' design, there is considerable tension between that decision and some of the Court's earlier pronouncements on its role in adjudicating federalism-based challenges to congressional enactments. Specifically, the Court's invalidation in *New York v. United States* of the take title provision on the ground that it was beyond Congress' authority to regulate the States under the Commerce Clause appears to conflict with the Court's earlier holding in *Garcia* that the States must rely on the national political process, and not the Court, for protection against burdensome congressional exercises of the commerce power. *Garcia*, 469 U.S. at 554.[23]

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[22] Because the State of New York originally supported the provisions it was now challenging, the Court was asked the question: "How can a federal statute be found an unconstitutional infringement of State sovereignty when state officials consented to the statute's enactment?" 112 S. Ct. at 2431. Discounting the notion that the constitutionality of a federal statute affecting the States depends upon the States' reaction to it, the Court ruled that "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *Id.*

[23] The difficulty of reconciling these two cases was noted by the dissenting Justices in *New York v. United States*, who viewed the majority's holding as "especially unpersuasive after *Garcia*" and stated that "the more appropriate analysis should flow from *Garcia*." 112 S. Ct. at 2443 (White, J., dissenting).

Concluding that the "political process ensures that laws that unduly burden the States will not be promulgated," 469 U.S. at 556,[24] the *Garcia* Court reserved to itself an extremely limited scope of judicial constitutional review of congressional regulation of State activities under the Commerce Clause. Indeed, following *Garcia*, the Court held that federal regulation of State activities may be invalid under the Tenth Amendment only if a State alleges and proves "some extraordinary defects in the national political process." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). Without identifying or defining the defects that might invalidate a congressional exercise of the commerce power, the *Baker* Court intimated that a State might be required to show that it "was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

Amici respectfully submit that the highly deferential approach to reviewing congressional regulation of States and localities announced in *Garcia* and *Baker* is at odds

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[24] As a purely factual matter, the States would have ample reason to question the validity of this assertion. One recent study has determined that during the 1980s, Congress enacted twenty-seven new laws or major amendments "which imposed significant additional regulatory burdens on state or local governments." Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: Regulatory Federalism—A Decade Later* at IV-6 (forthcoming 1993) (copy lodged with the Clerk of the Court and served on the parties). Fully nineteen of those twenty-seven new programs were passed after *Garcia*, *see id.* at 3-5, and while it cannot be shown that the Court's decision directly inspired these enactments, it would appear to have at least emboldened an already active Congress. The ACIR report, moreover, includes only what it considers to be significant new enactments; Congress actually enacted many more than twenty-seven new mandates. *See, e.g.*, John Kincaid, "Developments in Federal-State Relations, 1990-91," in *The Book of the States: 1992-93 Edition* 616 (The Council of State Governments 1992) (noting that "in 1990 and 1991 the Congress enacted, and the president signed, at least 23 mandates").

with the Framers' vision of our federalist system of dual sovereignty and with this Court's more recent pronouncements. Last Term's decision in *New York v. United States* is a welcome sign that the Court recognizes that our federalist structure enhances democratic self-government. *See New York*, 112 S.Ct. at 2431-32 ("'federalism secures to citizens the liberties that derive from the diffusion of sovereign power'") (quoting *Coleman v. Thompson*, 111 S.Ct. 2546, 2570 (1991) (Blackmun, J., dissenting)). Petitioners' construction of section 207(o) should be rejected because it conflicts with the constitutional principles recently reaffirmed in *New York*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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